UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

THE WATERS OF THREE RIVERS

Employer

and **Case 3-RC-11492**

1199 SEIU, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that The Waters of Three Rivers, hereinafter referred to as the Employer, is a New York corporation with an office and place of business in Painted Post, New York, where it is engaged in the operation of a long-term health care facility. During the past twelve months, the Employer, in conducting its operations, has derived gross revenues in excess of $100,000, and during the same period of time, has purchased and received goods and materials valued in excess of $50,000, directly from points located outside the State of New York.

Based on the parties' stipulation and the record as a whole, I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that 1199 SEIU, AFL-CIO, hereinafter referred to as the Petitioner, is a labor organization within the meaning of the Act. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

At the hearing, the Petitioner amended its petition to include all full-time and regular part-time licensed practical nurses ("LPNs") employed at the Employer's Painted Post, New York facility; excluding resident care coordinators ("RCCs"), minimum data set care planning coordinators ("MDS care planning coordinators"),[1] supervisors, professional employees, office clerical employees and guards.

The Employer contends that all LPNs, including RCCs and MDS care planning coordinators, are supervisors under Section 2(11) of the Act, as they all have the authority to assign work, responsibly direct employees, discipline, suspend and reward employees, or effectively recommend such action, and therefore that the petition should be dismissed. In the alternative, the Employer asserts that if the Board finds that some of the LPNs are not supervisors under Section 2(11) of the Act, then all LPNs, including RCCs and MDS care planning coordinators, should be included in the appropriate bargaining unit, as all LPNs share a community of interest.

[1] At the hearing, the parties initially identified minimum data set and care planning coordinators as two different job classifications. However, the record, and the parties' post-hearing briefs, establish that these positions are in fact one position and will be referred to hereinafter as MDS care planning coordinators.

At the hearing, the parties stipulated that the following positions should be excluded from the petitioned-for unit: the director of nursing, the assistant director of nursing, the day supervisor, the evening supervisor, the night supervisor, and the relief supervisor.[2] Based on the parties' stipulations, I shall exclude these job classifications from the bargaining unit found appropriate herein.[3]

Based on the evidence adduced during the hearing and the relevant case law, I find that the appropriate bargaining unit should include all full-time and regular part-time LPNs, including RCCs, employed by the Employer at its Painted Post, New York facility; excluding the director of nursing, assistant director of nursing, day supervisor, evening supervisor, night supervisor, relief supervisor, registered nurses ("RNs"), certified nursing assistants ("CNAs"), all other employees, and all guards and supervisors as defined in the Act.[4]

FACTS

As noted above, the Employer operates a skilled care nursing home that provides long-term health care to its residents. The Employer's facility is divided into three units (Unit A, Unit C and Unit D). There are a total of 46 private rooms, and 37 semi-private rooms with 2 residents per room. There are 40 residents in each of the three units.

The Employer's nursing department operates under the supervision of the Employer's administrator. The nursing department is comprised of a director of nursing, an assistant director of nursing, RNs, LPNs, and CNAs. The Employer operates the nursing department 24 hours per day, 7 days per week, with 3 work shifts (day, evening and night).

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[2] As indicated in more detail below, the record refers to day, evening, night and relief supervisors as shift supervisors.

[3] The parties' stipulation merely sets forth the names and job titles of those individuals from the unit who are to be excluded from the unit. It does not set forth the factual basis for such exclusion.

[4] As explained in more detail below, MDS care planning coordinators Shirley Bass and Colleen Metarko, and LPN Kathy Jaynes will be permitted to vote in the election directed herein subject to challenge by the parties.

The nursing department's day shift (Monday through Friday) consists of the director of nursing (currently vacant), the assistant director of nursing (Constance Trexler, RN)[5], day shift supervisor (Patricia Harper, RN), a house manager,[6] 3 RCCs (Dixie Ballance, Karla Sullivan, and Debra Coomb), 2 MDS care planning coordinators (Shirley Baas and Colleen Metarko), 3 staff LPNs (1 per unit),[7] and 15 CNAs (5 per unit). With the exception of the staff LPNs, all employees are scheduled from 6:00 a.m. to 2:00 p.m. The three day shift staff LPNs work from 7:00 a.m. to 3:00 p.m. However, the record establishes that the director of nursing, the assistant director of nursing, and RCCs typically work until 5:00 p.m.

The evening shift consists of the evening shift supervisor (Maudline Crannell, RN), a house manager, 3 charge LPNs (1 per unit) and 12 CNAs (4 per unit). CNAs on the evening shift work from 2:00 p.m. to 10:00 p.m. The remaining nurses are scheduled to work from 3:00 p.m. to 11:00 p.m.

The night shift consists of the night shift supervisor (Rachel Walters, RN), a house manager, three charge LPNs (one per unit) and six CNAs (two per unit). CNAs on the night shift work from 10:00 p.m. to 6:00 a.m. The remaining nurses are scheduled to work from 11:00 p.m. to 7:00 a.m. Although the record does not explain weekend staffing, MDS care planning coordinators Baas and Metarko alternate as day shift supervisors on weekends.

The Employer's 22 LPNs hold the following job titles: RCC, MDS care planning coordinator, shift supervisor, house manager, charge nurse, medication nurse, treatment nurse, and/or staff nurse. As noted above, the Employer employs three RCCs on the day shift, each of whom are LPNs: Dixie Ballance, Karla Sullivan, and Debra Coomb. The record establishes that

[5] Constance Trexler is also currently serving as acting director of nursing.
[6] As discussed in more detail below, the record does not identify who fills the house manager position on a regular basis for any shift.
[7] The record also refers to this position as shift nurse.

these three LPNs are the only nurses who currently fill the RCC position. RCCs report directly to the director of nursing and assistant director of nursing. The Employer provides each RCC with a written job description that states, in pertinent part:

> Position Summary: The Resident Care Coordinator is responsible for the direct and indirect nursing care of all residents on a specific nursing unit 24-hours per day.
>
> A. Job Knowledge and Role Responsibilities:
>
> …
>
> 3. Provides nursing care in accordance with Resident Care Policies and Procedures and ensures accountability for the safety and well-being of residents is maintained.
>
> …
>
> 6. Acts appropriately under the direction of the Assistant Director of Nursing/Director of Nursing and acts as an active member of the interdisciplinary team.
> 7. Demonstrates ability to adjust to changes in units/shift assignments and meet resident and facility needs.
>
> B. Resident Care Responsibilities:
> 1. Makes daily rounds for all areas of nursing care under his/her supervision, including visiting residents to evaluate immediately physical and emotional condition related to resident needs and problems, and implementing necessary nursing interventions.
> 2. Delegates nursing and non-nursing care of residents during the shift to nursing personnel through work assignments.
>
> …
>
> 6. Observes nursing care and visits residents to ensure that nursing care is carried out as directed and treatments and medications are administered in accordance with physician's instructions.
>
> …
>
> 8. Supervises assigned nursing personnel including responsibility for instruction, assignment, direction, performance assessment and discipline. Works cooperatively with other assigned supervisors on the unit to ensure satisfactory work performance of all unit employees.

Stephen Goss, the Employer's administrator, testified that RCCs are assigned to a specific unit and are responsible for their unit at all times. For example, Dixie Balance is assigned to Unit C and oversees the overall operation on this unit. Goss testified that RCCs are generally responsible for the admission of residents for their specific unit (approximately 40 residents per unit), employee staffing, completing assignment sheets for nurses, checking work

and various tasks performed by nurses, and ensuring that residents receive any necessary medical services.

More specifically, RCCs admit residents to the nursing home by preparing resident charts and saving resident care plans on the Employer's computer system. RCCs also complete work schedules for nurses every two weeks. However, there is no record evidence that indicates RCCs are responsible for replacing absent nurses during a work shift. Instead, Crystal Burgess, staff LPN on the day shift, testified that, if for some reason, a CNA or her relief LPN for the evening shift were absent, she would inform her shift supervisor, RN Harper. Burgess further testified that it is Harper's responsibility to find replacement nurses. RCCs complete assignment sheets for CNAs. Assignment sheets inform staff employees about the type of care necessary for each resident. CNAs are not assigned to specific residents, but instead rotate residents each week, while remaining on their specific unit.

RCCs also assume the duties of charge nurse during the day shift. As discussed in more detail below, charge nurses are generally responsible for coordinating the work on their assigned unit and ensuring that residents receive appropriate care.

Goss testified that RCCs are available to lend assistance if problems arise on their unit, including while they are off-duty. However, there is no record evidence establishing the type of problem that would cause another nurse to contact the off-duty RCC. In fact, Debra Preston, charge LPN on the night shift, testified that if she encountered a problem that she could not handle while acting as night shift supervisor, then she would contact Constance Trexler, assistant director of nursing.[8]

RCCs also participate in evaluations of CNAs and LPNs, and complete Employee Memorandum forms which are used to memorialize employee misconduct. RCCs are salaried

[8] Preston serves as acting night shift supervisor when needed.

employees earning approximately $2.00 more per hour than other LPNs.[9] According to assistant director of nursing Trexler, RCCs are not entitled to overtime pay, except when they replace absent charge LPNs on other shifts. The record does not establish the frequency with which RCCs replace absent LPNs; however, Trexler testified that it happens often.

RCCs also receive annual performance evaluations, based on a number of different criteria, including job knowledge, role responsibilities, resident care responsibilities, and quality of care. The Employer's evaluation form establishes that RCCs are evaluated, in pertinent part, on the following area:

> B. Resident Care Responsibilities
>
> …
>
> 8. Supervises assigned nursing personnel including responsibility for instruction, assignment, direction, performance assessment and discipline. Works cooperatively with other assigned supervisors on the unit to ensure satisfactory work performance of all unit employees.[10]

The record does not, however, indicate whether RCCs are evaluated based on the actual performance of nurses on their specific unit.

The Employer also employs two MDS care planning coordinators on the day shift, each of whom are also LPNs: Shirley Baas and Colleen Metarko. These two LPNs are the only nurses who currently serve as MDS care planning coordinators. MDS care planning coordinators report directly to the director of nursing and assistance director of nursing. The record does not contain a job description for MDS care planning coordinators. However, Goss testified that MDS care planning coordinators are responsible for preparing and maintaining documents and records for each resident, which make up the "Minimum Data Set," which is a term referred to by the

[9] The record does not establish LPN's hourly wage rates, whether serving as RCCs, MDS care planning coordinators or in any other classification. The only other record evidence regarding wages is that RCCs, MDS care planning coordinators and house managers are salaried nurses, while the remaining LPNs are paid on an hourly basis.

[10] This is the same language used by the Employer in its job description for RCCs.

Employer without further explanation in the record. With the exception of resident care plans, the record does not identify the different types of documents that are included in a resident's Minimum Data Set.

Resident care plans set forth specific treatments, medications, and other clinical areas for each resident. Care plans are available to all staff members and must be reviewed prior to treating any resident. Trexler testified that all treatment must be provided in accordance with resident care plans. The record further indicates that resident care plans are updated frequently by either doctors, RNs, or LPNs.

MDS care planning coordinators are also responsible for providing nursing care to residents and ensuring that treatments and medications are administered in accordance with physician instructions. MDS care planning coordinators also participate in evaluating CNAs and complete Employee Memorandum forms which are used for disciplinary purposes as discussed below.

MDS care planning coordinators also receive annual performance evaluations. However, unlike RCCs, MDS care planning coordinators are not evaluated on their ability to supervise other employees. As noted above, MDS care planning coordinators are salaried nurses, but there is no record evidence that distinguishes their pay from RCCs or other LPNs. Similar to RCCs, MDS care planning coordinators are not entitled to overtime pay, except when they serve as charge LPN on the evening or night shift.

The record also indicates that LPNs serve as house managers. Administrator Goss testified that this position, which is filled for all three shifts, was created because he wanted additional supervision at the Employer's nursing home. However, the record does not specifically address the duties and responsibilities of house managers or when this position was

created. In fact, Goss testified that this position is in "name only" and it is not a paid position (i.e., nurses who perform house manager duties are not compensated for such extra work). Goss testified that only salaried nurses serve as house managers, identifying LPNs Debra Coombs, Dixie Balance, Colleen Metarko, and Karla Sullivan, as having served as house managers.[11]

The remaining LPNs on the day shift are staff nurses. Staff nurses are generally responsible for providing nursing care to residents on their assigned unit. Day shift staff nurses report directly to the day shift supervisor or their specific RCC. During the day shift, staff nurses also assume the responsibilities and job duties of the treatment nurse and the medication nurse. Treatment nurses provide necessary treatments to residents, according to their care plans. Treatments may include administering feedings, completing skin rounds and monitoring pressure sores. Medication nurses are responsible for providing oral and injectable medications to residents in a timely manner, in accordance with physician orders. According to the Employer's job description for medication nurses, they are also responsible for the accurate count of narcotics that are given to each resident, in accordance with Resident Care Policies and Procedures.[12]

Trexler testified that staff LPNs also participate in evaluations of CNAs and complete Employee Memorandum forms. Trexler also testified that staff LPNs are evaluated on their management and supervision of CNAs. More specifically, the staff LPN evaluation forms state, in pertinent part:

[11] There is no record evidence as to whether RNs or other LPNs serve as house managers.

[12] The record does not explain the Resident Care Policies and Procedures or identify which policies and procedures are covered therein.

…

B. Resident Care Responsibilities

…

2. Management and Supervision of Nursing Assistants:

a) Report pertinent information to Nursing Assistants on assigned residents prior to delivery of care and provides direction in prioritizing resident care.

b) Reports resident information to Nurses and Nursing Assistants reporting for next shift.

c) Ensures all aspects of delivery of care to residents is completed within the established time frames according to Resident Care Policies and Procedures.

d) Ensures all aspects of resident care information is up-to-date and reviewed by Nursing Assistants prior to the delivery of care.

However, like the RCCs, the record does not establish whether staff LPNs are evaluated based on the actual performance of CNAs on their specific unit.

On the evening and night shifts, the LPNs on each unit assume the same job duties as staff LPNs on the day shift (i.e., passing medications, performing treatments, and providing necessary nursing care, or serving as the charge nurse). The Employer's job description of a charge nurse states, in pertinent part:

> Position Summary: The LPN Charge Nurse is responsible for the coordination and supervision of the assigned unit in the absence of the Resident Care Coordinator or RN Head Nurse and ensures overall plan of care. The Charge Nurse should follow the nursing care plan as established by the Resident Care Coordinator or Shift Supervisor, but may make changes as care needs or physician orders change.

Goss testified that charge nurses pass medications and generally are responsible for the assignments of CNAs and answering any questions that may arise. However, the record does not explain how charge nurses are responsible for the assignments of CNAs, or what types of assignments are made and whether they are different from the original assignment sheets prepared by the RCCs.

Crystal Burgess, staff LPN on the day shift, testified that sometimes she serves as the charge nurse on the evening shift. Burgess testified that as charge nurse on the evening shift, she is responsible for all doctor calls, talking with family members and handling emergencies that

arise on the specific unit. For example, Burgess testified that if an emergency occurs, such as a resident falling or low blood sugars, she immediately notifies the evening shift supervisor, who assesses the situation and identifies any injuries to the resident. Burgess testified that if a resident fall was due to a care plan violation, there would be a discussion as to whether any disciplinary action should be taken. However, the record does not identify which nurses are involved in the discussion.

Trexler testified that staff, treatment, medication and charge nurses are also responsible for assigning and directing CNAs on their specific units, while ensuring that such work is completed in a timely manner, in accordance with resident care plans. However, Trexler provided no specific examples of the assignment and direction of work. Chad Humphrey, a probationary staff LPN on the day shift, testified that he directs CNAs to perform certain tasks. For example, he explained that he directs CNAs to assist him in lifting patients. More specifically, Humphrey testified that when he needs assistance with lifting a patient, he goes into the hallway and asks the first CNA he finds to come and help. The record is limited to similar examples describing how LPNs direct CNAs.

Burgess testified that as a LPN, she does not assign or prioritize patients for CNAs. Burgess testified that when she arrives to work, CNAs already have their assignments and are working. Debra Preston, charge LPN on the night shift, also testified that she does not assign work to CNAs. Preston testified that it is not her job to prioritize work or the order of patients for CNAs. Instead, Preston testified that RCCs are generally responsible for CNA assignments and any necessary changes to those assignments. However, Preston did not explain how the RCCs made CNA assignments or identify what changes are made to CNA assignments.

LPNs serve as shift supervisors when the regularly scheduled RN shift supervisor is absent. Goss testified that shift supervisors are responsible for the oversight of the nursing home on a particular shift. More specifically, Trexler testified that shift supervisors are available to charge nurses on each unit to answer questions, assist on difficult issues or to offer second opinions on nursing care. Trexler testified that LPNs, with one exception, serve as shift supervisors only in the absence of a regular shift supervisor.[13] For example, the record shows that Rachel Walters, RN shift supervisor for the night shift, has been on disability leave for the past six to eight weeks. In her absence, LPNs Kathy Jaynes and Debra Preston have been serving as acting night shift supervisors. The record indicates that 12 of approximately 22 LPNs have served as acting shift supervisors, including the 3 RCCs, both MDS care planning coordinators, and 7 senior LPNs. However, the record does not establish the length of time LPNs have served as acting shift supervisors.

As noted above, the Employer also employs a certain number of RNs, although the record does not establish how many or whether RNs assume other duties or serve in different job classifications in the Employer's nursing home. Instead, the record only identifies RNs who serve as either the director of nursing, assistant director of nursing, or shift supervisor. The record does establish that RNs generally serve as the highest-ranking nurse on all three of the Employer's shifts.

The CNAs are primarily responsible for resident care.[14] Such duties include, but are not limited to, toileting and grooming residents, cleaning their dentures and eyeglasses, trimming nails and hair, and assisting LPNs with additional resident care responsibilities. The record

[13] LPN Kathy Jaynes is the regular night supervisor two times a week, in addition to serving as acting night supervisor while RN night supervisor Rachel Walters has been on disability leave.

[14] The record does not establish how many CNAs are employed by the Employer.

establishes that senior CNAs are also responsible for training newly hired CNAs. CNAs receive their daily assignments from assignment sheets drafted by RCCs. The record also shows that CNAs typically stay in their assigned unit, but rotate residents every two weeks. It appears from the record that all CNAs are able to care for the residents by following their assignment sheets and resident care plans.

All LPNs receive the same benefits, including overtime opportunities. As noted above, although RCCs and MDS care planning coordinators are salaried nurses, they are also entitled to overtime opportunities when they fill in for absent LPNs. All RNs and LPNs wear the same uniform, which includes white pants and a white knit top with "The Waters" insignia. The CNAs wear white pants but a blue top.

As noted above, LPNs participate in annual performance evaluations of CNAs. The record establishes that the evaluation process starts with the human resource department. Human Resources initially notifies the director of nursing that an evaluation for a CNA is due. The director of nursing assigns the evaluation to the LPN who is most familiar with the evaluated CNA.[15] The assigned LPN completes the evaluation and gives it back to the director of nursing for her review. After reviewing the evaluation, the director of nursing gives the evaluation back to the LPN, in order for it to be reviewed with the CNA. Upon review, the CNA is allowed to add his/her comments and signature. The evaluations contain no recommendations by LPNs, or any Employer official, concerning merit pay raises or any other wage adjustment.

The record establishes that past directors of nursing have requested that LPNs make certain changes to evaluations, prior to reviewing them with the CNAs. For example, charge LPN Debra Preston testified that a former director of nursing, Christina Stowell, asked Preston to change two evaluations. More specifically, Preston, on at least one occasion, was asked to

[15] LPNs have not received any training on how to complete evaluations.

decrease the overall score from "above expectation" to "meets expectation." Similar testimony was provided by staff LPN Nancy Grapevine. More specifically, Grapevine testified that former director of nursing Carol Collins, and former assistant director of nursing Karen Pruden, asked Grapevine to make changes to evaluations she had completed. However, the record does not indicate what specific changes were requested.

The Employer's Employee Handbook addresses employee performance evaluations and states, in pertinent part:

> 203 Performance Evaluations
> … Merit-based pay adjustments are awarded by The Waters of Three Rivers in an effort to recognize above average employee performance. The decision to award such an adjustment is dependent upon numerous factors, including the information documented by the formal performance review process.

Acting Director of Nursing Trexler testified that the determination of merit pay awards by the Employer is based on numerous factors, consistent with the Employee Handbook. However, Trexler also contradictorily testified that there are no factors used to determine merit pay adjustments, other than the employee evaluations. The record does not identify the other factors referred to in the Employee Handbook that affect a merit wage adjustment.

Both Trexler and former director of nursing Carol Collins, testified that the numerical scores on the evaluations were used by the human resources department to determine pay adjustments. Trexler testified that she was not sure how the overall score was determined. Collins testified that the circled scores on an employee's evaluation are averaged by the human resources department and that the employee's raise is based on the overall averaged score. However, neither Collins nor Trexler could explain what specific wage increase would result from a particular score on an evaluation. Dixie Balance, an RCC and former LPN, testified that she was unaware of whether the scores she gave on an evaluation resulted in any particular wage

adjustment. There is no record evidence concerning the amounts of any specific wage adjustments or what, if any, merit wage increases have been granted by the Employer.

RCCs are responsible for evaluating other LPNs in the same manner as LPNs evaluate CNAs. LPN, Kathy Jaynes, who is currently acting as night shift supervisor, has evaluated other charge LPNs on the night shift. However, Jaynes' evaluation of charge LPNs appears to be a result of her responsibilities while acting as night shift supervisor for the duration of RN Walters' disability leave.

As noted above, the record establishes that LPNs complete Employee Memorandum forms, which are used to discipline CNAs. According to the Employee Memorandum forms in evidence, CNAs have been disciplined, and on one occasion suspended, for such conduct as excessive absences, not following resident care plans, not following pocket work sheets, not following a schedule for repositioning a patient, and insubordination. Testimony establishes a second suspension of a CNA, based on failing to follow a resident care plan.

LPNs can issue Employee Memorandum forms to employees for some infractions without first seeking management's approval.[16] Trexler testified that LPNs follow the Employer's Employee Handbook that identifies categories of offenses that may lead to discipline. However, Trexler testified that because the Employee Handbook does not identify every disciplinary situation, LPNs use their judgment, learned through their training, to decide what types of conduct require discipline. However, the record does not indicate what disciplinary situations are covered by the Employer's Employee Handbook.[17]

[16] As discussed below, LPNs can not issue Employee Memorandum forms for suspensions or terminations.

[17] The entire handbook is not in evidence.

The record further establishes that completed Employee Memorandum forms must be reviewed by the director of nursing prior to their issuance. In fact, Regina Beadles, charge LPN on the evening shift, testified that Employee Memorandum forms are reviewed by the director of nursing, to confirm that the misconduct that is the subject of the Employee Memorandum was in violation of the Employer's rules and regulations set forth in the Employer's Employee Handbook. The record further establishes that the director of nursing may overrule the LPN and decide not to issue any discipline. For example, Beadles testified that she attempted to discipline a CNA for insubordination. More specifically, Beadles, while acting as night shift supervisor, asked a CNA to stay for overtime, as the facility was understaffed. The CNA began yelling and left. Beadles completed the Employee Memorandum form and gave it to former director of nursing Carol Collins for review. However, Beadles testified that she received the form back two to three months later. No discipline issued as a result.[18]

The record further establishes that with the exception of RCCs, LPNs do not have access to employee disciplinary files. Accordingly, Crystal Burgess, staff LPN, testified that she cannot complete the section "Type of Action Taken" on the Employee Memorandum form, as she does not have access to employee disciplinary files to mark the correct type of discipline, whether it be an oral or written warning.

The record also indicates that LPNs have not received any training on when to issue discipline or how to complete Employee Memorandum forms. For example, Burgess testified that she signed an Employee Memorandum form that was admitted in the record. However, Burgess testified that Linda Parzych, a former RN evening shift supervisor, assisted her in filling out the form and explained to her the proper language to be used.

[18] It appears from the record that LPN shift supervisors cannot require CNAs to work overtime.

The record also shows that suspensions must also be reviewed by the Employer's administrator and the director of nursing. In fact, the Employee Memorandum form specifically states that if the completed form "pertains to a suspension or discharge, the facility administrator must also sign the form." The record identifies only two incidents that resulted in suspensions. Both suspensions were based on failing to follow resident care plans, and in fact one of the incidents led to a resident fall. However, there is no record evidence that establishes that LPNs were involved in the decision to suspend these CNAs, or that they recommended such action.

ANALYSIS

Section 2(11) of the Act defines a "supervisor" as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As the Board has noted in numerous cases, the statutory indicia outlined in Section 2(11) are listed in the disjunctive, and only one need exist to confer supervisory status on an individual. See, e.g., Phelps Community Medical Center, 295 NLRB 486, 489 (1989); Ohio River Co., 303 NLRB 696, 713 (1991); Opelika Foundry, 281 NLRB 897, 899 (1986); Groves Truck & Trailer, 281 NLRB 1194, n. 1 (1986). However, mere possession of one of the statutory indicia is not sufficient to confer statutory status unless such power is exercised with independent judgment and not in a routine or clerical manner. Hydro Conduit Corporation, 254 NLRB 433, 437 (1981).

Section 2(11) of the Act sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if they hold the authority to engage in any 1 of the 12 listed supervisory functions; their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and their authority is exercised "in the

interest of the employer." NLRB v. Kentucky River Community Care, Inc., et al., 121 S.Ct. 1861, 1867, 167 LRRM 2164, 2168 (2001).

The burden of proving supervisory status lies with the party asserting that such status exists. See Kentucky River, supra, 121 S.Ct. at 1866, 167 LRRM at 2167-2168; Michigan Masonic Home, 332 NLRB 1409, 1409 (2000). Lack of evidence is construed against the party asserting supervisory status. See Michigan Masonic Home, supra, at 1409. "Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." Phelps Community Medical Center, supra, at 490. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. See Sears, Roebuck & Co., 304 NLRB 193 (1991).

The record reflects that LPNs do not hire, transfer, lay off, recall, promote, or discharge other employees, and they do not adjust employee grievances, and do not effectively recommend such actions. However, the Employer argues, in its post-hearing brief, that all LPNs, including RCCs, and MDS care planning coordinators, have identical duties and responsibilities which include the authority to responsibly direct, assign, discipline, suspend, and reward employees. The Petitioner, in its post-hearing brief, argues that the RCCs and MDS care planning coordinators have the authority to assign and direct work and to discipline employees.

The Supreme Court recently held that the judgment used by registered nurses when directing less skilled employees to deliver services in accordance with employer-specified standards, cannot automatically be precluded from the definition of independent judgment simply because such judgment is "professional or technical." Kentucky River, supra, 121 S.Ct.

at 1868, 167 LRRM at 2169. The Supreme Court did not hold that every exercise of professional or technical judgment is necessarily an exercise of independent judgment. The Court recognized the Board's right to determine the degree of "independent judgment" necessary to meet the statutory threshold of supervisory status. Id., 121 S.Ct. at 1867, 167 LRRM at 2168.

The Supreme Court further noted in Kentucky River that, where an individual assigns or directs work based on orders or regulations issued by the employer, the degree of judgment may be circumscribed to such an extent that it falls below the statutory threshold for a finding of supervisory status. Id. The Court also suggested that "responsible direction" may be defined "by distinguishing employees who direct the manner of others' performance of discrete *tasks* from employees who direct other *employees*, as Section 2(11) requires." Id., 121 S.Ct. at 1871, 167 LRRM at 2172. As the Court acknowledged, "[c]ertain of the Board's decisions appear to have drawn that distinction in the past, see, e.g., Providence Hospital, 320 NLRB 717, 729 (1996)." Id.

In Providence Hospital, supra, the Board relied on two cases, General Dynamics Corp., 213 NLRB 851, 859 (1974), and Wurster, Bernardi & Emmons, Inc., 192 NLRB 1049 (1971), to distinguish between employees who direct the manner in which employees perform tasks and the supervisory direction of other employees. In these two cases, the employees in question rotated into the directing or "team leader" positions and, on other occasions, were, in turn, directed by those whom they directed as team leaders. The Board noted that these cases, and other similar cases, shared a "common theme" where:

> Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position, such as the direction which is given by a lead or journey level employee to another or apprentice employee, the direction which is given by an employee with specialized skills and training which is incidental to the directing employee's ability to carry out that skill and training, and the direction which is given by

> an employee with specialized skills and training to coordinate the activities of other employees with similar specialized skills and training.

See Providence Hospital, supra, at 729.

Similarly, in Beverly Health & Rehabilitation Services, 335 NLRB 635, 635 fn.3 (2001), enfd. in relevant part, 317 F.3d 316, 323-324 (D.C. Cir 2003), the Board found, in accordance with Kentucky River, supra, that LPNs at the nursing home exercised only routine authority when directing other employees in the taking of patient's temperatures, vital signs and monitoring fluids. The Board concluded that this type of direction did not require the use of independent judgment within the meaning of Section 2(11) of the Act. Therefore, the Board found that these employees were not supervisors under the Act. See also, Franklin Home Health Agency, 337 NLRB 826, 830-831 (2002) (finding that showing other employees the proper way to perform a task does not confer supervisory status).

I conclude that the LPNs, including RCCs and MDS care planning coordinators, do not "responsibly direct" employees within the meaning of Section 2(11), because they direct the manner of others' performance of discrete tasks, such as toileting, grooming, cleaning resident dentures and eyeglasses or asking for assistance in lifting a patient, rather than directing employees in general. The Board has previously held that rotating "supervisors," who essentially direct tasks, rather than employees, are not vested with genuine management authority to a degree that triggers Section 2(11)'s "undivided loyalty" policy. For example, in Northern Montana Health Care, 324 NLRB 752, 753 (1997), the Board noted that, "if an LPN sees a nurses aide performing a task incorrectly, the LPN will simply demonstrate to the aide the correct way to perform the task. This is nothing more than the exercise of the LPN's greater skill and experience in helping a less skilled employee perform her job correctly."

Even assuming that LPNs did responsibly direct other staff members, such direction falls short of the degree of independent judgment sufficient to make LPNs supervisors. In assigning tasks, RCCs and other LPNs must follow physicians' orders, resident care plans, and the Employer's Resident Care Policies and Procedures when administering medicine and treatment. Staff members, including LPNs and CNAs, generally know what functions they are responsible for and how to accomplish such tasks. Moreover, the record fails to establish that LPNs are evaluated based on the performance of CNAs.

I further find that the authority of LPNs, including RCCs and MDS care planning coordinators, to assign particular tasks to CNAs is exercised without the degree of independent judgment sufficient to establish their supervisory status. The LPNs do not assign tasks based on the degree of difficulty or on their own assessment of the CNAs' abilities to perform such tasks. I find that any judgment used by LPNs to assign work and direct staff members to perform discrete tasks is sufficiently routine, or determined or limited by the Employer's established policies and procedures to such a degree that this judgment falls short of the statutory independent judgment required for supervisory status. See Kentucky River, supra; Dynamic Science, Inc., 334 NLRB 391 (2001); Chevron Shipping Co., 317 NLRB 379, 381 (1995), cited with approval in Kentucky River, supra, 121 S.Ct. at 1867, 167 LRRM at 2169. See also, Greenhorne & O'Mara, Inc., 326 NLRB 514, 517 (1998).

Moreover, the record fails to establish that LPNs can require staff members to come in to work or to remain late, even when a unit is understaffed. The job descriptions of the classifications at issue herein, relied upon by the Employer, are not given controlling weight by the Board. Instead, the Board insists on evidence supporting a finding of actual, as opposed to mere paper, authority. See Training School at Vineland, 332 NLRB 1412, 1416 (2000).

With respect to employee discipline, LPNs do not have the independent authority to discharge, lay off, or suspend employees. All LPNs may issue verbal counselings and employee memorandum forms to employees for infractions such as excessive absences, failing to follow resident care plans or insubordination. However, the record establishes that LPNs discretion in issuing warnings is limited by the Employer's Employee Handbook, which identifies category offenses that may lead to discipline. Moreover, the record establishes that the LPNs have not been instructed on when and how to use Employee Memorandum forms.

In its post-hearing brief, the Employer relies on Health Care & Retirement Corp., 328 NLRB 1056 (1999), to support its position that LPNs have sufficient authority to issue discipline to CNAs. In Health Care & Retirement Corp., supra, the employer utilized a progressive disciplinary system, which involved three categories of discipline including minor offenses, serious offenses, and major offenses. The Board found that the LPNs exercised independent judgment when disciplining CNAs, where LPNs determined what specific category to classify a given infraction and to take the appropriate action. The Board concluded that based on this evidence, the employer had met its burden of establishing that the LPNs possessed supervisory authority.

However, the instant case is distinguishable from Health Care & Retirement Corp., supra. The record is devoid of evidence establishing that the verbal counselings or written Employee Memorandum forms lead to more severe discipline for repeat offenses, or that they impact the employee's employment status in any way. Although the record references a progressive disciplinary policy, there is no evidence that explains or defines such policy. Verbal counselings or even written warnings that have no significant impact on the employee's employment status or impair an employee's expected employment benefit, do not constitute "discipline" within the

meaning of Section 2(11) of the Act. See Hydro Conduit Corporation, 254 NLRB 433 (1981); Tucson Gas & Electric Company, 241 NLRB 181, 182 (1979). Where oral or written reports simply bring substandard performance to the Employer's attention, without recommendations for further discipline, the LPNs' role in advising the director of nursing of the conduct, or reciting the conduct in an Employee Memorandum form, is merely a reporting function. See Passavant Health Center, 284 NLRB 887, 891 (1987).

With respect to employee suspensions, the record fails to establish that LPNs recommend such action.[19] Accordingly, I find that any judgment used by LPNs to discipline staff members is sufficiently curtailed by the Employer's established policies and procedures to such a degree that this judgment falls short of the statutory judgment required for supervisory status.[20] See Passavant Health Center, supra, at 888-891; Northcrest Nursing Home, 313 NLRB 491, 492-493 (1993).

The Employer also asserts, in its post-hearing brief, that all LPNs have the ability to reward employees, or effectively recommend such action, when they evaluate CNAs. In support of its position, the Employer relies on Cape Cod Nursing Home, 329 NLRB 233 (1999), Hillhaven Kona Healthcare Center, 323 NLRB 1171 (1997), and Bayou Manor Health Center, 311 NLRB 955 (1993). In all three cases, the Board found a direct correlation between the LPNs' annual performance evaluations of nursing assistants and the merit increases or occasional bonuses received by the nursing assistants. More specifically, in Cape Cod Nursing Home, supra, the numerical rating of "outstanding" received a six-percent wage increase, while a "very

[19] Acting Director of Nursing Trexler was unable to identify any instance of a LPN suspending an employee. While RCC Balance testified that as an LPN, prior to becoming an RCC, she had suspended a CNA, the CNA testified that she had been suspended by the assistant director of nursing and the RN supervisor rather than by Balance.

[20] A further indication of the lack of discretion in this regard is that the Employee Memorandum form states that the Facility Administrator must sign the form if the form pertains to a suspension or discharge.

good" evaluation received a five-percent increase. In Hillhaven Kona Healthcare Center, supra, a rating between 3.0 to 4.0 would result in a three percent increase, while a rating of above 4.0 would result in a six-percent increase. Finally, in Bayou Manor Health Center, supra, the evaluation scores directly determined the amount of the merit increase that nursing assistants received, which was between five percent and zero. The Board also found that these evaluations specifically determined the amount of the departmental bonus that nursing assistants received.

However, the instant case is distinguishable from these three cited cases, as the record fails to establish a specific link between the performance evaluations and any merit wage increases received by CNAs. In fact, there is no record evidence of what, if any, merit wage increases have been granted by the Employer. Moreover, the Employer's Employee Handbook states that employee performance evaluations are just one factor used by the Employer to determine a merit pay adjustment. The testimony in this regard was contradictory, and thus fails to establish that employee evaluations are the determining factor in employee merit pay adjustments. The record also fails to establish how a particular score on an employee performance evaluation results in a merit wage adjustment. The record therefore, does not establish that the evaluations of CNAs by LPNs, or the evaluations of LPNs by RCCs, directly affect employee wages. See Elmhurst Extended Care Facilities, 329 NRLB 535, 537 (1999) (Board found that the annual evaluations of CNAs by charge nurses did not govern the granting of merit increases to the CNAs, where there was no direct correlation of evaluation scores to specific merit increases). See also Ten Broeck Commons, 320 NLRB 806 (1996) (Board found that LPNs did not make any recommendations on the evaluation forms and there was no showing that any numerical ratings directly determined any wage increase or bonus).

In Harborside Healthcare, Inc., 330 NLRB 1334, 1335 (2000), the Board found that nurses' evaluations of nursing assistants did not determine wage or merit increases where the evidence failed to establish a "direct link" between the evaluations, which included numerical ratings, and pay increases. The Board noted that the nurses did not make recommendations on the evaluations for any pay increases, and that the record failed to establish that any nursing assistants had received a merit wage increase. Similarly, in the instant case, the evaluations do not contain any recommendations for pay increases; the record does not establish that any specific merit increases have been granted and does not otherwise establish a direct link between the ratings given on the evaluation and any pay increases. Finally, the record does not establish that the employee performance evaluations are the sole factor in determining merit pay adjustments.

The record also establishes that the LPNs have been told by management to change the ratings or evaluations which have resulted in the evaluated employees receiving lower ratings. All evaluations are reviewed by the director of nursing prior to their receipt by the CNAs. In Ten Broeck Commons, supra, the Board, in finding the LPNs did not exercise supervisory authority in completing employee evaluations, noted that the evaluations were reviewed by a supervisor and that the numerical score given by the LPNs on the evaluations were sometimes changed by the supervisor. In Harborside Healthcare, supra, the Board found that where revisions to evaluations were directed by management, the LPNs role was "more akin to experienced lead employees, who submit to a higher authority their opinions on the abilities of the employees that they evaluate." Id. at 1335. Similarly, in the instant case, the evidence establishes that the LPNs have been directed by management to make substantive changes in evaluations. Thus, the record in the instant case fails to establish that the annual performance

evaluations have any effect on employee terms and conditions of employment or that LPNs have the authority to effectively recommend rewarding other employees.

Finally, concerning the Employer's supervisory hierarchy, the record establishes that generally LPNs are not the highest-ranking nurses during any of the three work shifts. There is some record evidence that on weekends, MDS care planning coordinators serve as shift supervisors on a regular basis. However, the record fails to specifically establish that MDS care planning coordinators exercise supervisory indicia in Section 2(11) of the Act.

Accordingly, based on the above, I find that the Employer and the Petitioner, both of whom are asserting the supervisory status of certain LPN job classifications, have not met their burden of proving that the LPNs, or RCCs have supervisory authority within the meaning of Section 2(11) of the Act. Therefore, I shall include these disputed classifications in the unit found appropriate herein.[21]

There are approximately 22 employees in the bargaining unit found appropriate herein.

[21] The Petitioner seeks to exclude LPN Kathy Jaynes from the unit as a Section 2(11) supervisor because she regularly serves as a night supervisor two nights per week. However, the record does not disclose the factual basis for the parties' stipulation to exclude the night supervisor position from the unit or other evidence to distinguish her duties from those of other LPNs included in the unit herein. Thus, there is no basis in the record for me to conclude that Jaynes serves in a supervisory capacity when she works as a night supervisor. Accordingly, I shall permit Jaynes to vote in the election directed herein subject to challenge by the parties. MDS care planning coordinators Shirley Baas and Colleen Metarko regularly serve as shift supervisor, a position the parties have stipulated should be excluded from the unit found appropriate herein. In the absence of a factual basis on the record for such an exclusion and sufficient record evidence to otherwise distinguish them from other LPNs on the unit, I will permit the MDS care planning coordinators to vote subject to challenge by the parties in the election directed herein.

CONCLUSION

Accordingly, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time licensed practical nurses, including resident care coordinators, employed by the Employer at its Painted Post, New York facility; excluding the director of nursing, assistant director of nursing, day supervisor, evening supervisor, night supervisor, relief supervisor, registered nurses, certified nursing assistants, all other employees, and all guards and supervisors as defined in the Act.

There are approximately 22 employees in the bargaining unit found appropriate herein.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate, as described above, at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and

who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **1199 SEIU, AFL-CIO**.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to lists of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision **2** copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by The Waters of Three Rivers with the Regional Director of Region Three of the National Labor Relations Board who shall make the lists available to all parties to the election. In order to be timely filed, such list must be received in the Thaddeus J. Dulski Federal Building, 111 West Huron Street, Room 901, Buffalo, New York 14202 on or before **October 15, 2004**. No extension of time to file the lists shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **October 22, 2004**.

DATED at Buffalo, New York this **8th** day of **October, 2004**.

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RHONDA P. ALIOUAT,
Acting Regional Director
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